In the United States Circuit Court of Appeals

For the Ninth Circuit

OCCIDENTAL CONSTRUCTION COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 29

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

This is an action brought against the United States under the provisions of the act of March 3, 1887, commonly known as the Tucker act, 24 Stat. at Large, 505 Chap. 359, U. S. Comp. Stat, 1916, Vol. I, page 553. The facts are as follows:

In January, 1913, the United States were engaged in doing certain construction work upon the Mohave Indian Reservation in the State of Arizona for the improvement thereof and needed to secure at once mules and grading equipment for use in the work. Occidental Construction Company was engaged at the time in the business of letting mules and grading equipment for hire and its place of business was in the City of Los Angeles. One

F. R. Schanck was a superintendent of irrigation in the employ of the United States and was in charge of the said construction work on the Mohave Indian Reservation. On or about the 10th of January, 1913, Schanck, as agent of defendant in error, secured at said City of Los Angeles, from plaintiff in error one hundred head of mules and certain grading equipment and harness and other personal property for use by the United States in the work on said Reservation. The questions raised on this appeal relate only to the mules. Schanck agreed in behalf of the United States (Tr. fol. 151) to transport the mules from Los Angeles to the Reservation, there use them upon said work, and upon completion of the work to return them to the corral of the Occidental Construction Company in Los Angeles. Schanck and said Company agreed that the United States should pay ten dollars per month for the use of each mule, and a further sum for the use of the other personal property. Schanck caused the mules to be transported by the United States to said Indian Reservation, and they were there used by the United States upon said work until the completion of it on April 10, 1913.

After the Occidental Construction Company had agreed to let the mules and equipment, but before they had been delivered, the officers of the Company asked Schanck to sign the contracts, exhibits "A" and "B", attached to the petition. Schanck replied that he had no legal authority to sign such contracts, but that he was constantly hiring mules for the government and that he supposed he would sign the contracts. Schanck

was in fact constantly hiring mules for the United States. (Tr. fol. 155). The contracts, Exhibits "A" and "B", were afterwards signed by Hugh P. Coultis, a clerk and special disbursing agent of the United States Indian Service, who was directed by Schanck to sign them. The form of the signature was as follows: "United States Indian Service, by Hugh P. Coultis, Clk. and Spl. Disbursing Agent".

The District Court has found that neither Coultis nor Schanck had authority to execute the contracts Exhibits "A" and "B". Plaintiff in error does not on this appeal seek to overturn said finding or to establish liability on the part of the United States under said written contracts, but seeks to recover on the implied contract of the United States as bailees.

The Mohave Indian Reservation has been set apart by Congress as a reservation for the habitation and use of Indians. The work on which the mules were used by the United States was the construction of a dike thereon for the improvement of the reservation and for the benefit of the Indians living thereon. Congress by an act had authorized the work and made an appropriation therefor. The reservation is within the territorial limits of Mohave County, Arizona (Tr. fols 158, 159.).

The County Assessor of Mohave County on the 7th day of March, 1913, while the mules and equipment were upon the reservation, and were in the custody of the United States and were being used by them in said work, assessed upon them State and County taxes amounting to $415.14. The valuation placed upon the mules by the

assessor was $100 per head, and they were in fact worth not less than that amount (Tr. fol. 160). During the entire time that the mules were in Arizona they were on the Reservation, excepting only while they were in transit to and from the California line and while they were in the custody of the tax assessor.

The United States continued to use the mules in the work upon the reservation until April 10, 1913, when the work was completed. On that date Schanck directed a person in the employ of the United States to drive the mules from the reservation to the railroad station at Topock, located in said Mohave County, Arizona, a few miles from said reservation, to be shipped from there to Los Angeles. On the way to Topock one of the mules was drowned.

When the remaining ninety-nine mules reached Topock and while they were still in the custody of the person who had driven them there the County Assessor of Mohave County stated to said person that he would take possession of them. Said person replied that that released him and that if the Assessor was an officer he would turn them over to him. No one in behalf of the defendant in error then made any objection to the Assessor's taking possession of the mules or did anything to prevent it. The Assessor thereupon took possession of the mules under a claim of lien because of the alleged tax. Soon after the seizure of the mules defendant in error notified plaintiff in error that the mules had been seized. The officers of the company thereupon communicated with Schanck and were informed by him that he

expected to secure the release of the mules without payment of the alleged tax. This expectation on Schanck's part continued until on or about April 23rd. On or about April 15th plaintiff in error informed Schanck that if it was necessary to pay the tax to prevent a sale of the mules it would advance the money. In reply Schanck requested the Company to send the money to pay the tax, but said he would not pay it over unless necessary. On April 16th the Company sent Schanck sufficient money to pay the tax, together with the penalties then due. From the 10th to the 23rd of April, Schanck was engaged more or less continuously in an effort to secure the release of the mules without payment of the alleged tax. On April 23rd the Company paid to a representative of the United States a further sum sufficient to pay the amount of the alleged costs and expenses then due, making with the prior payment a total of $825.94. On the same day this sum was paid under protest by a representative of the United States to the Tax Assessor and the United States took possession of the mules and shipped them to Los Angeles, where on April 26th they were delivered to the plaintiff in error. Later a refund of $225 was made by the assessor to the plaintiff in error because of a reduction in the tax rate.

During the time that the mules were in the custody of the United States they were properly fed, but they were used so negligently that their shoulders were bruised and their necks made sore, and on account thereof twenty-one of them were in such condition that plaintiff in error was not able to use them from the 26th day of April, 1913, until the 1st day of June, 1913.

While the mules were in the possession of the Tax Assessor "they did not receive sufficient food, and in fact were nearly starved." (Tr. fol. 169). While the mules were in the custody of the Assessor plaintiff in error sent a telegram to Schanck asking whether the mules were being properly fed, to which Schanck replied "mules being fed." When the mules were returned to the plaintiff in error they "were deteriorated in strength and flesh and were weak and emaciated and unfit for work." (Tr. fol. 173). Their condition was due to their bruised necks and sore shoulders and to their lack of food while in the possession of the Tax Assessor.

It is alleged in the petition (fifth cause of action), and is not denied in the answer, that the mules were returned in such condition that plaintiff in error was unable to use them from the 26th day of April, to and including the 31st day of May, 1913. The reasonable value of their use during that period at $10 per head per month would be $1154.34. That because of their condition plaintiff in error was obliged to, and did, expend upon the mules for care and feed and for veterinary services $1382.50, and that there was a permanent depreciation in value of the mules to the amount of $742.50. Defendant in error has not paid plaintiff in error the foregoing sums, nor any part of the same, nor any rental for the mules for the period from the 11th day of April to the 23rd day of April, 1913, while they were in the custody of the Tax Assessor, which would amount at said rate to $428.67, nor the sum paid to the Tax Assessor for feed and care of the mules during the time he had them, to-

wit: $388.80 (fifth cause of action); nor the amount of the tax paid under compulsion (seventh cause of action), which, after the deduction of the refund, charges for feed, etc., amounts to $212.14. The total of the foregoing items which plaintiff in error seeks to recover is $4386.55. The District Court awarded plaintiff $176.70, no part of which is included in the foregoing items. The United States paid monthly for the rental of the mules at the rate of ten dollars per head per month from the time they were taken from Los Angeles until they were returned there except for the period while they were in the possession of the Tax Assessor.

The foregoing statement of the case is based entirely on the findings of fact made by the District Court and on the allegations and admissions of the pleadings.

ASSIGNMENT OF ERRORS.

Plaintiff in error in connection with its petition for writ of error makes the following assignment of errors which it avers occurred upon the trial, proceedings and judgment in this cause, to-wit:

I.

The Court erred in its conclusions of law, and said conclusions are incorrect and erroneous and inconsistent with and not supported by the findings of fact.

II.

The Court erred in holding that the defendant was not

liable for injuries done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by the defendant on the Mohave Indian Reservation.

III.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession of the defendant and in use by defendant on the Mohave Indian Reservation.

IV.

The Court erred in holding that the defendant was not liable for the injuries done to plaintiff's mules while said mules were in actual possession and custody of the County Assessor of Mohave County, Arizona.

V.

The Court erred in failing to award plaintiff damages for the injuries found by the Court to have been done to plaintiff's mules while said mules were in the actual possession and custody of the County Assessor of Mohave County, Arizona.

VI.

The Court erred in failing to award plaintiff any sum as rental for the mules while they were in the custody of the County Assessor of Mohave County, Arizona.

VII.

The Court erred in failing to award plaintiff any dam-

ages because of the amount plaintiff paid to the County Assessor of Mohave County, Arizona, for feed and transportation of feed and for care of the mules while they were in the custody of the County Assessor of said Mohave County, Arizona, and for the alleged tax.

VIII.

The Court erred in finding judgment for the plaintiff for only One Hundred Seventy-six & 70/100 Dollars ($176.70) and not for the damages suffered by plaintiff because of the injuries to the mules while in the actual possession of the defendant and in use by the defendant on Mohave Indian Reservation and while in possession of the County Assessor of Mohave County, Arizona, and said judgment is inconsistent with the findings of fact and with defendant's admissions in the pleadings.

ARGUMENT.

The position of the plaintiff in error rests on two principal contentions:

First. That the United States were bailees of the mules under an implied contract, and consequently were liable for any injuries to the mules while in their possession, which resulted from negligence on the part of the bailees, their servants or agents.

Second. That the United States, being the sovereign power, cannot shield themselves behind the County Assessor of Mohave County and say that because the Coun-

United States in fact, did make monthly payments to the Occidental Company at said rate beginning in February, 1913. (Tr. fol. 174, 175). In short, the United States became bailees or hirers of the mules.

A bailment may be founded on an implied contract.

Phelps v. People, 72 N. Y. 334;
Blake v. Campbell, 106 Mass. 115;
Burke v. Trevitt, 4 Fed. Cas. No. 2163.

The California Civil Code, Section 1928, provides:

"The hirer of a thing must use ordinary care for its preservation in safety and in good condition."

This code provision entered into and became a part of the implied contract under which the United States took and used the mules.

Canada So. Ry. Co. v. Gebhard, 109 U. S. 527;
Pignaz v. Burnett, 119 Cal. 157, 160.

The rule as to care was substantially the same at common law.

Hall v. Warner, 60 Barbour (N. Y.) 198.

Plaintiff's action was properly brought under the Tucker Act, for even in a case of conversion it is held that the bailor has an election and may sue in tort for the conversion or may sue in contract.

Crawford v. Burke, 195 U. S. 176, 194;
In Re Coe, 169 Fed. 1002;
Lehmann v. Schmidt, 87 Cal. 15;
Harms v. New York, 69 Misc. 315, 125 N. Y. S. 477;
Keith v. Booth Fisheries Co., 27 Del. 218, 227;
Bates v. Bigby, 123 Ga. 727;

Belmont Coal Co. v. Richter, 31 W. Vir. 858, 860, 8 S. E. 609.

In the last named case the court states the doctrine as follows:

> "In general it is optional with the plaintiff to declare against the bailee in form ex contractu for the breach of the express contract entered into by him, or of the promise implied from the act of bailment, or in tort for the breach of the duty which is by law impliedly cast on the bailee; but it seems that in whatever form he may frame his declaration the *action is still one of contract wherever the liability of the defendant in fact rises out of a contract.*"

There is a long line of cases in which it is held that the United States is liable on implied contracts.

Clark v. U. S., 95 U. S. 539;
Saloman's case, 19 Wall. 17;
U. S. v. Buffalo Pitts Co., 234 U. S. 228;
St. Louis Hay & Grain Co. v. U. S., 191 U. S. 159;
U. S. v. Berdan Fire Arms Mfg. Co., 156 U. S. 552;
U. S. v. Palmer, 128 U. S. 262;
U. S. v. Great Falls Mfg. Co., 112 U. S. 645;
U. S. v. Lynah, 188 U. S. 445;
Bostwick v. U. S., 94 U. S. 53;
Sorenson v. Lyle, 3 U. S. Dist. Ct. Hawaii, 291;
Dougherty v. U. S., 18 Ct. of Claims, 496;
Moran Bros. v. U. S., 39 Ct. of Claims, 486;
U. S. v. Andrews, 207 U. S. 229;
Crocker v. U. S., 240 U. S. 74.

In the case of Clark v. United States *supra,* the petitioner, who was the owner of a steam boat, entered into an oral contract with an officer of the quartermaster's department whereby the United States was to have the use of the steamboat for $150 per day and was to pay

for the steamboat if it should be wrecked while being used by the United States. The United States had the use of the steamboat for eight days when it was wrecked and totally destroyed. The petitioner sought to recover the rental and the value of the boat. The United States pleaded in defense the statute requiring such a contract to be in writing. The court held that while the statute was mandatory and not merely directory, and therefore the petitioner could not recover under the express contract, yet he could recover under an implied contract for a *quantum meruit.*

The Court said:

> "In the present case the implied contract is such as arises upon a simple bailment for hire, and the obligations of the parties are those which are incidental to such a bailment. The special contract, being void, the claimant is thrown back upon the rights which result from the implied contract. This will cast the loss of the vessel upon him. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. . . . As negligence is not attributed to the employees of the government in this case, the loss of the vessel, as before stated, must fall on the owner. Of course the claimant is entitled to the full value of his vessel during the time it was in the hands of the government's agents."

In this case petitioner was allowed to recover upon an implied contract, although the petition contained no count on an implied contract.

In the case of Salomon v. United States, *supra,* a quartermaster received corn for the government and gave a receipt and voucher for the amount of the price. The

government used part of the corn and allowed the remainder to decay from exposure and neglect. The court held that irrespective of whether or not the contract was in compliance with the statute requiring such contracts to be in writing, there was an implied contract to pay for the value of all the grain. It is to be noted in this case that the government did not use all of the grain for which recovery was allowed, but that some of it decayed, and as to the portion that decayed it might be argued that the government had not received any benefit. Nevertheless it was held liable to pay for it.

In the case of United States v. Buffalo Pitts Co., *supra,* the United States took over certain machinery in the possession of a contractor who was engaged in reclamation work for the government and who failed to carry out his contract. Included in this machinery was a traction engine upon which the Buffalo Pitts Co. held a mortgage. The conditions of the mortgage having been broken the plaintiff demanded of the United States the return of the engine. This was refused. After the work had been finished the United States abandoned the traction engine and it was taken possession of by plaintiff. The court held that there was an implied contract on the part of the government to pay for the use of the engine during the time that the government had the use of it.

In United States v. Andrews, *supra,* defendant had entered into a contract with the United States for the sale of certain paper. The contract was not in writing. The paper was delivered to a carrier designated by the United States and shipped to a consignee of the United

States in the Philippine Islands. Part of the paper was lost, and part of it was damaged. The United States was held liable for the full value of the paper despite the fact that there was no written contract. The Supreme Court said that it was of no consequence that there was no contract in writing since the contract had been executed. This case, like Salomon's case, *supra,* shows that the liability of the United States does not turn on the question whether the United States has actually received benefit from the contract, since most of this paper when it reached the consignee was not usable, but turns on the question whether or not the contract had been executed.

We have shown that the relationship between the United States and the Occidental Company was a contractual one—that of hirer and letter, bailor and bailee —and that although the contract was implied it was binding upon the United States because executed. We now come to the question whether the obligations of the United States under said contract with respect to proper care of the property bailed were the same as those of an individual in similar circumstances. The trial court took the position that the injury to the mules while in the hands of the United States was the result of negligence on the part of the employees of the United States, and that the United States were not liable for damages caused by the negligence of their employees. Plaintiff in error contends that since the obligation is one that arose out of an implied contract the vital and determining fact is that the contract had been broken, and that it is of no consequence in determining the rights of the plaintiff in

error that the contract was broken through negligence on the part of employees of the United States. In other words, that the United States, no more than any other contracting party, can excuse the breach of their contractual obligation by saying that the breach occurred because someone in their employ was negligent.

The case of Bostwick v. United States, *supra,* was an appeal from the Court of Claims to the United States Supreme Court. One Lovett, of whose estate the plaintiff was administrator, accepted a written offer of a general in the United States army for the hiring by the United States of certain premises. The offer was contained in a letter. No lease was ever executed, and the United States agreed to nothing in express terms except to pay the rent at the rate of $500 a month for the term of one year. During the occupancy of the premises by the United States part of the buildings were destroyed by fire. Also trees and fences were in other ways destroyed and gravel and stone were carried away. Plaintiff sought among other things to recover damages for these various injuries. Mr. Chief Justice Waite delivered the opinion of the court and pointed out that in every lease, unless expressly excluded, there is an *implied obligation* on the part of the lessee so to use the property as not unnecessarily to injure it; that while there was no lease in form, nevertheless the contract followed by delivery of possession and occupation was equivalent for the purposes of the action to a lease duly executed. In relation to the destruction of the buildings by fire, the court decided that there was no liability on

the part of the United States, for the reason that there is no implied obligation in a lease which would make the tenant answerable for accidental damages and that in this case it had not been found, and was not claimed, that the premises were burned through the neglect of the United States. As to the destruction of the trees and fences and the taking and carrying away of gravel and stone, the court held the situation to be different. Referring to the contract under which the United States held the premises the court said:

> "As has been seen, that does not bind the United States to make good any loss which necessarily results from the use of the property, *but only such as results from the want of reasonable care in the use.* It binds them not to commit waste or suffer it to be committed. If they fail in this they fail in the performance of their contract and are answerable for that in the Court of Claims which has jurisdiction of 'all claims founded upon any contract, express or implied, with the government of the United States.' . . . *The implied obligation as to the manner of use is as much obligatory upon the United States as it would be if it had been expressed.* If there is failure to comply with the agreement in this particular it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. *All depends upon the contract.* Without that jurisdiction does not include actions for damages by the army; with it damages contracted against may be recovered as for breach of contract."

The court found that the acts in relation to the trees, fences, etc., were voluntary waste and were within the prohibition of the implied agreement and remanded the cause to the Court of Claims for determination there of

the amount of damage. The opinion contains these significant statements:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

The line is clearly drawn in this case, as it was in the case of Clark v. United States, *supra,* between cases where damage occurs without any proof of negligence on the part of the United States and those cases where negligence is shown to be the cause of the damage. We have in the case at bar all the elements on which liability was predicated in the Bostwick case—violation of an implied obligation and negligence on the part of the United States which caused violation of the obligation, together with damage therefrom to plaintiff. Plaintiff in error contends that the rule laid down in the Bostwick case is determinative of its rights, and that under that rule it is entitled to recover for the injuries to the mules while in the actual possession of the United States.

The Bostwick case is clearly distinguishable from such cases as Juragua Iron Co. v. U. S., 212 U. S. 297, and Herrera v. U. S., 222 U. S. 558, in which cases property was seized or destroyed by agents of the United States in time of war and in which cases the Supreme Court points out that there was no element of contract. Also from such a case as Bigby v. U. S., 188 U. S. 400, where plaintiff sued under the Tucker Act to recover for injuries received through the negligent management of an elevator in a building of the United States by an employee

bruised shoulders and sore necks would be $285.75. Adding to this the rental charge, the total of these two sums is $523.05. Since each of the sums may be arrived at by simple mathematical calculation they should be added without further hearing in the District Court to the amount for which judgment was therein awarded to plaintiff in error.

II.

THE UNITED STATES ARE LIABLE FOR THE DAMAGES CAUSED BY THE TAKING AND DETENTION OF THE MULES BY THE TAX ASSESSOR.

The United States as bailees were bound to deliver the mules back into the hands of the Occidental Company at the corral in Los Angeles whence they took them. (Tr. fol. 151.) The Civil Code of California, Section 1953, provides as follows:

> "At the expiration of the term for which personal property is hired the hirer must return it to the letter at the place contemplated by the parties at the time of hiring; or if no particular place was so contemplated by them at the place at which it was at that time."

The bailment would not be terminated until the property had been so returned. For all injuries to the bailed property during the continuance of the bailment the bailee would be liable, unless excused by some set of facts recognized by the law as a valid excuse.

A bailee cannot turn over property of the bailor to a third person merely because that person is a creditor

of the bailor and desires to take and hold the property to enforce payment of his debt. The bailee can excuse his parting with possession of the property to other than the bailor only when it is taken from him under legal process. If the property is exempt from such process then the failure to deliver the property to the bailor cannot be excused on the ground that it has been taken away from the bailee under such process.

Kiff v. Old Colony &c. R. R. Co., 117 Mass 591; 19 Am. Rep. 429.

In this case the bailees plead as an excuse seizure and detention of the mules by the County Assessor of Mohave County for taxes. Even had the bailees in this case been ordinary individuals, they could not excuse their failure on such ground, and this is true for two reasons: (A) Because there was no legal tax assessed upon the mules; (B) Because even had there been a legal tax the seizure itself was unlawful.

A. The Mules Were Not Taxable in Arizona.

The mules were on the reservation during all the time they were within the boundaries of the State of Arizona excepting when they were in transit between the California state line and the reservation (Tr. fol. 160, 161.)

Property is ordinarily taxable at the residence of the owner, and the fact that it is temporarily within the boundaries of a state or in transit through a state does not give it situs for taxation in such state.

Ogilvie v. Crawford County, 7 Fed. 745;
Burlington Lumber Co. v. Willitts, 118 Ill. 559; 9 N. E. 254;

Brown County v. Standard Oil Co., 103 Ind. 302; 2 N. E. 758.

If the contention hereinafter set forth by plaintiff in error in relation to the non-taxability of the mules while on the reservation is correct, then the passing of the property between the California state line and the reservation through a portion of the territory over which the state of Arizona has jurisdiction would have the same legal effect, so far as the right to tax the property in Arizona is concerned, as if the property were passing from California through Arizona to another state.

While on the reservation and in use by the United States in its business for the benefit of the Indians the mules were exempt from taxation because of the provisions of the act of Congress under which Arizona received statehood and of the ordinance of the people of Arizona accepting statehood. The organic act (U. S. Stat. at Large Vol. 36, page 568) provides as follows:

> "Section 20, subdivision second: That the people inhabiting the said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States, or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished *the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;* that the lands and other property belonging to citizens of the United States residing without the said

State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State *upon lands, or property therein belonging to, or which may hereafter be acquired by the United States or reserved for its use;* but nothing herein or in the ordinance herein provided for shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian Reservation owned and held by an Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

The Constitution adopted by the people of Arizona contained the following provisions:

ARTICLE XX.

ORDINANCE.

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States, or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Fifth. The lands and other property belonging to citizens of the United States shall never be taxed

> at a higher rate than the lands and other property situated in this state belonging to residents thereof, and no taxes shall be imposed by this State upon lands or property situated in this State belonging to or which may hereafter be acquired by the United States, or reserved for its use.

Plaintiff in error contends that the combination of facts existing in this case, even if no one of them in itself was sufficient to do so, was as a whole sufficient to render the mules exempt from taxation on the reservation. They were upon ungranted public lands, or upon lands owned or held by Indians, and under the provisions of the ordinance such lands remain under the absolute jurisdiction and control of the Congress of the United States. The mules were being used by the United States for their own purposes in the improvement of the reservation for the benefit of the Indians. They were, therefore, within the meaning of the ordinance "property reserved by the United States for its use," and the Organic Act and the Arizona Constitution provide that no tax shall be imposed by the state upon such property.

Plaintiff in error admits that property upon an Indian reservation may be taxable, under some circumstances, as for example cattle of a foreign corporation grazing upon such reservation (Thomas v. Gay, 169 U. S. 264; Truscott v. Hurlburt Co., 73 Fed. 60), and recognizes that the fact that the property was in the custody of the United States would not in itself exempt it from taxation by the state.

> Thompson v. Kentucky, 209 U. S. 340;
> Carstairs v. Cochran, 193 U. S. 10.

Here, however, we have a situation different from those discussed in the cases cited above. Here not only was the property on the Indian Reservation, as in the case of Thomas v. Gay and Truscott v. Hurlburt, &c., *supra,* but it was also in the custody of the United States; and not only was it in the custody of the United States as in the cases of Thompson v. Kentucky and Carstairs v. Cochran, *supra,* but it was also being used by the United States for its own purposes, to-wit: for the improvement of the Indian Reservation under an act of Congress providing therefor and was also being used directly for the benefit of the Indians themselves.

In the Truscott case it was suggested that owners of cattle might avoid taxation of the same by seeking an asylum on the Reservation, and it was suggested that the property in that case was taxable because it was under the protection of the state. We submit that in our case neither of those two reasons applies. Since the property was taken upon the reservation by the United States clearly the owner of the property was not thereby seeking a tax-exempt asylum for it, and since it was actually in the custody of the United States it could not be fairly said that it was under the protection of the state, but rather that it was under the protection of the federal government.

The cases cited, however, indicate that similar statehood ordinances to that of Arizona have received not a strict and literal, but an extremely liberal, interpretation whereby, despite the exclusive jurisdiction of Congress over the reservations, the states have been allowed

to tax certain property of persons not Indians and not being used for the benefit of the Indians upon such reservation. The clause exempting from such taxation property owned by the United States or "reserved for their use" interpreted with equal broadness and liberality would exempt from taxation property taken upon a reservation in Arizona by the United States and used there by them under the authority of an act of Congress in work for the Indians. The work of improving an Indian Reservation is a work of such direct benefit to the Indians that it is within the purview of the said provisions of the Arizona statehood ordinance, which was intended to confer special benefits upon the Indians, and the instrumentalities used in effecting it come properly within the exemption of that act. The situation existing in this case is one that touches the Indians much more closely than does a tax upon cattle grazing upon Indian lands. It may even have an important bearing on the question of whether or not the reservation would remain habitable by the Indians. If mules already taxed in California are to be taxed again in Arizona if taken there by the United States to work on the reservation, it might be more difficult for the Indians to secure necessary improvements upon the place that has been by law set apart for them as a habitation, and it might also be more expensive for the United States to make improvements thereon.

The Supreme Court of the United States has held that coal mined by a lessee of Indian lands is not subject to taxation by the state, because the lease is an instrumentality through which the United States is performing its duty to the Indians.

Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292.

It has also held that a lease by Indians of land upon an Indian reservation for the sole purpose of mining and producing petroleum and natural gas, could not be taken into consideration in fixing the amount for which the corporation holding the lease should be taxed. The court says that whatever the provisions of the state constitution may be "it cannot be permitted to relieve from the restraint upon the power of the state to tax property under the protection of the Federal Government. That the leases have the immunity of such protection we have decided."

Indian Oil Co. v. Oklahoma, 240 U. S. 522.

Plaintiff submits that there is no case reported in the books where a tax has been imposed under similar circumstances, nor any case that lays down a principle that would justify taxation by the state under circumstances such as these. Such taxation would tend to thwart one of the very purposes of the constitutional provision cited, to-wit: the free and unhampered use by the United States of any instrumentalities it may see fit to use for the improvement of Indian lands and the betterment of the living conditions of the Indians thereon.

B. The Seizure of the Mules was Illegal Because Not Made in Compliance with the Provisions of the Arizona Codes.

Arizona Civil Code, section 4872, provides as follows:

> The County Assessor in each of the several counties in this State, when he assesses the property of

> any person, firm, association, company or corporation, liable to taxation, not owning real estate within the county of sufficient value in the assessor's judgment to pay taxes on both the real and personal property of such person, firm, association, company or corporation, shall proceed immediately to collect the taxes on the personal property so assessed; provided, that personal property in transit or temporarily in a county shall not be assessed therein, but where the owner is domiciled, and if said owner shall neglect or refuse to pay such taxes, the assessor or his deputy shall seize sufficient of such personal property to satisfy the taxes and costs.

There is no other provision in the Arizona Code for seizure of property by the County Tax Assessor.

The taxes assessed upon the mules amounted to $415.14 (Tr. fol. 159). Even after the costs had accrued the tax, with interest and costs, amounted to only $825.94, of which $225 was thereafter refunded (Tr. fol. 167, 168). The value of the mules was not less than $100 per head (Tr. fol. 160). The provision of the Arizona Code quoted above would not under such circumstances authorize the seizure of more than ten head of mules, which would represent a value of $1000, yet the Assessor seized ninety-nine head, valued by the Assessor himself (Tr. fol. 160) at $9900. No protest was made by the person in charge of the mules for the United States on the ground that the amount of the property seized was excessive, nor indeed on any other ground; yet the code provision strictly limits the assessor to the seizure of "sufficient of such personal property to satisfy the taxes and costs." Moreover, the section quoted expressly provides that personal property in transit or temporarily in a county

shall not be assessed therein, but where the owner is domiciled. The United States, no more than any other bailee, can excuse themselves by pleading the illegal act of the assessor.

C. The County Assessor Could Not in Any Event Lawfully Deprive the United States of Possession.

This is the main contention of the plaintiff in error on this phase of the case. Contentions A and B are secondary. Should we be held to be wrong in both of those contentions we may still maintain this principal position. The United States hold the sovereign authority. They are supreme. The authority and rights of a state or a county, insofar as they conflict with those of the United States, are subordinate thereto. A state cannot interfere with, nor can it hinder the lawful activities, of the United States or of its officers or agents acting under constitutional authority or carrying out the requirements of an act of Congress.

We have this situation: The United States are sovereign; they are in possession of certain property and are bound by the terms of an implied contract to return that property to Los Angeles. The United States, being thus bound, the question is whether any subordinate authority may interfere with them in the performance of their contractual obligation and prevent the fulfillment thereof.

The attribute of sovereignty in the United States precludes the acquirement or enforcement against them of many rights that may be enforced against private individuals. Titles may not be acquired by a state against the United States by right of eminent domain.

U. S. v. Chicago, 7 Howard 185.

No foreclosure decree can be made against the United States as the owner or tenant of mortgaged premises.

Christian v. Atlantic &c. R. R. Co., 133 U. S. 233, 27 Cyc. 1548.

Adverse possession of land cannot be acquired against the United States.

Doran v. Central Pac. R. R. Co., 24 Cal. 246;
Gluckauf v. Reed, 22 Cal. 469.

An officer or agent of the United States is not subject to be sued as a garnishee in a state court.

Fischer v. Daudistal, 9 Fed. 145;
Buchanan v. Alexander, 4 Howard 20;
Harris v. Dennie, 3 Peters 292.

A state court cannot by mandamus compel an officer of the United States to perform any act in connection with his duties as such federal officer.

McClung v. Silliman, 19 U. S. 598.

A state court has no jurisdiction to enjoin an officer of the United States Army from doing work which he is commanded to do by his superior officer in the execution of an act of Congress.

In re Turner, 119 Fed. 231.

Even in criminal matters the state has no authority over a federal officer to punish him for an offense arising out of or in connection with the performance of his duties as a federal officer.

In re Nagle, 135 U. S. 1;
In re Waite, 81 Fed. 359.

In the Nagle case the California courts undertook to hold and try Nagle for murder because while acting as an escort of a United States Judge in going from one court to another, and in protecting the judge from an infuriated attorney in his court, Nagle killed the assailant. The United States Supreme Court held that the offense, if any, was one over which the California courts had no jurisdiction because it arose in the performance of Nagle's duty as an officer of the United States, and on habeas corpus proceedings Nagle was discharged.

In the Waite case it appeared that Waite held a commission from the commissioner of pensions for the purpose of investigating certain alleged fraudulent pretenses in connection with the granting of pensions. It was his duty to take evidence and examine into claims of fraud pertaining to pensions. While in the performance of that duty and thus taking evidence it was charged by the witness that Waite maliciously threatened to compel him to do an act against his will, which under the Iowa Statute is an indictable offense, and Waite was indicted in the state court for the alleged offense. On his trial he urged that in doing the things complained of he was in the performance of an official duty as a United States officer. He was convicted and the conviction was affirmed by the Iowa Supreme Court. Upon application by Waite to the United States District Court he was discharged on a writ of habeas corpus by Judge Shiras, and this judgment was affirmed by the United States

Circuit Court of Appeals and afterwards cited with approval by the Supreme Court of the United States.

The foregoing cases all rest upon the same principle, that it is absolutely beyond the power of the state, or its officers, to hinder or interfere with an officer or agent of the United States in the performance of his duties as such officer or agent. The purpose of the law is that the United States may be absolutely free and untrammeled in carrying on their activities. It is clear from the foregoing cases that the Arizona court would have had no power by any order it might make to compel the Superintendent of Irrigation to turn over the stock in question to the County Tax Assessor. Nor if in the performance of his duty as custodian of the stock and in preventing the County Assessor from seizing the same he had committed a breach of the peace would the Superintendent of Irrigation have been subject to criminal prosecution under the laws of the State of Arizona. This is true not only in relation to the Superintendent of Irrigation himself, but equally true as to any subordinates or agents of his acting in the premises in his behalf. Surely a county assessor cannot have power to compel the delivery of property where the courts themselves would have no authority.

There is, moreover, a case in some respects strikingly like our own case in which the United States Circuit Court of Appeals recognizes the rule that a county officer has no authority to take personal property on which a tax is due out of the possession of an agent of the United States. The case is:

U. S. v. Moses, 185 Fed. 90.

It is a writ of error in an action by the United States v. a sheriff of a county in South Dakota. The United States entered into a contract with the Widell Finley Company to do certain work on an irrigation project, under which contract the government was authorized in event of a default by the contractor to take possession of the machinery, tools, animals, etc., of the contractor and carry out the work. The contractor defaulted, and an officer of the United States took possession of the property involved in the action and used the same to complete the work, which work was completed on August 31, 1907. Meanwhile the property of the contractor had been assessed for taxation by the local authorities. When the work contracted for had been completed it was asserted by the United States officers that the contractor was indebted to the United States in the sum of $4500 for breach of contract, and the officer in charge of the work retained and used the property in further construction work, claiming the right to do so as an offset to the amount alleged to be due from the contractor as damages for breach of contract.

In October, 1907, the defendant sheriff seized the property under process duly issued for the collection of taxes assessed against the contractor, at which time the property was in possession of an engineer in charge of the irrigation project. The United States brought replevin. The Circuit Court rendered judgment for the defendant on the appeal. This judgment was affirmed, but in affirming it the Circuit Court of Appeals, after

stating that the United States had no right to possession of the property after the work was completed, said:

> "To render such seizure unlawful it must appear that the officer [of the United States] had a legal right to hold and retain possession of the said property for and on behalf of the United States. A mere claim of right in the government is not sufficient."

In our case the United States at the time of the seizure of the mules by the County Assessor were in lawful possession of them and had a contractual duty to perform in relation to them. They were bound to return the stock to the owner in Los Angeles. At the time of the seizure by the Assessor that contract had not been completed. The seizure was a flagrant interference by an officer of the state or county without even such color of sanction as a decision or order of a state court could give him, with the performance and fulfillment of a contract by the sovereign United States, made for the prosecution of work authorized by an act of Congress. The County Assessor therefor did not only what he had no right to do but what the law cannot contemplate that he had any power to do.

He had no power in legal theory to take property from the possession of his sovereign. It is not open to the United States to plead that he took it from them against their will. As a practical matter it does not appear that he had the actual physical force to take the property had any resistance been offered. It has been held that where the officer taking or seeking to take possession has no authority to do so the bailee

should offer such resistance to the taking of the property and should adopt such methods for retaking, if taken, as a prudent and intelligent man would if his own property were taken under a claim of right without legal process.

Morris Storage &c. Co. v. Wilkes, 1 Ga. App. 751, 58 S. E. 232;

Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294;

Bliven v. Hudson River R. R. Co., 35 Barbour 188, affirmed 36 N. Y. 403.

The very least that could be expected of the United States under these circumstances would be that if the person in charge of the mules from incompetence or lack of understanding of the rights of the parties, should allow the mules to be taken, then the United States marshal should immediately retake possession of them from the tax assessor. If for any imaginable reason that had not been feasible, still the United States should have promptly brought a replevin suit and in that way again secured possession of the property. The failure of the United States either to retain possession of the property, or once lost immediately to regain it, makes our case stand precisely the same as if the United States had voluntarily relinquished (and that is in fact practically the case, Tr. fol. 163, 164) the possession of the stock to a stranger who was absolutely without right or power to take it. Having thus voluntarily delivered the property to a third person they are liable to pay the damages suffered by plaintiff in error as a result thereof. Those damages are set forth

in the fifth and seventh causes of action. They consist of:

(1) The reasonable value of the use of the ninety-nine mules from April 10, the date of the seizure, to April 23rd, the date of their delivery back to the United States (the period from April 1st to 10th and that from April 23rd to April 26th has been paid for by the United States (Tr. fol. 175)). The rental value of one mule for this period of thirteen days at the rate of $10.00 per month would be $4.33, for the 99 mules $428.67.

(2) The loss of use of the 99 mules from the 26th day of April to and including the 31st day of May, 1913, during which time they were unfit for work because they had not been properly fed while in the possession of the Tax Assessor (Tr. fol. 57, 58, 59), allegations not denied in the answer (See also findings, Tr. fol. 173); the loss of the use of one mule for this period of 35 days, reckoned at $10.00 per month, would amount to $11.66; for 99 mules $1154.34.

(3) Feed and care of said mules during the period from April 26th to and including May 31st, 1913. These items are alleged in the petition (Tr. fol. 58, 59) to amount to $24.50 for veterinary services and $1358 for feed and care,—total $1382.50. These allegations are not denied in the answer.

(4) Permanent deterioration in value of the mules. This is alleged in the petition (Tr. fol. 61) to amount to $742.50. The allegation is not denied in the answer.

(5) Sums paid to the Assessor for feed and trans-

portation of feed for the mules and for care of them while in his custody. These charges are part of the $825.94 paid to the Assessor. (Tr. fol. 167). They are alleged in the petition (Tr. fol. 62, 63) and are not denied in the answer. These charges might be recovered on a somewhat different ground from the actual tax. One theory on which plaintiff in error should recover these is that the United States were bound to feed and care for the mules until they should be returned to the bailee, and since the United States failed to do so, and the bailor was obliged to pay for feed and care the amounts paid therefor are a proper charge against the bailee. They amount to $388.80.

(6) The amount of the tax, costs and expenses paid to the Assessor. (Seventh cause of action (Tr. fol. 69); Findings paragraph VIII (Tr. fol. 167.)) From this amount should be deducted the refund of $225.00 (Tr. fol. 168) and the items of expense set out in the next preceding paragraph of this brief, amounting to $388.80. These deductions leave a balance of $212.14.

The money for the tax was paid by plaintiff in error to the United States and by them paid to the Tax Assessor. (Tr. fol. 166, 167.) The payment by the plaintiff in error was not a voluntary payment but was made under compulsion. It was necessarily made in order to secure possession of the property and to avoid serious and perhaps irreparable loss through the sale of the property (Tr. fol. 166.) Such a payment could have been recovered by the party making it.

De Bow v. U. S., 11 Ct. Clms. 672, 678;

McTigue v. Supply Co., 20 Cal. App. 708;
Spain v. Talcott, 165 App. Div. 815; 152 N. Y. S. 611, 618;
U. S. Nickel Co. v. Barrett, 86 Misc. 337, 148 N. Y. S. 325, 328.

Since it was not a voluntary payment, but one which plaintiff in error was compelled to make because of the failure of the bailees to retain or regain possession of the mules, it was a part of the damages suffered by the plaintiff in error through the failure of bailees to fulfill their contractual obligations and may be recovered from them.

The total of the foregoing sums which plaintiff is entitled to recover under this phase of the case is $4308.95. All of them may be arrived at by simple mathematical calculation based on the figures supplied by the pleadings and findings of fact, and they should be added without further hearing in the District Court to the amount for which judgment was therein awarded to plaintiff in error.

It should be noted in this connection that while all of the mules "were deteriorated in strength and flesh and were weak and emaciated and unfit for work" when returned to the Occidental Company in Los Angeles (Tr. fol. 173), and as alleged in the petition (Tr. fol. 59), the plaintiff in error was deprived of the use of said mules on account of their said condition from the 26th day of April, to and including the 31st day of May, 1913, a statement which was not controverted in the answer, yet in addition thereto 21 of said mules were in such condition because of their sore shoulders and necks

that they were not fit for use during said period and plaintiff was not able to use them. (Tr. fol. 173.) As to the 21 mules therefore, plaintiff in error is in a position to recover under either or both of its main contentions, since they were unfit for work, both because of their treatment while in the hands of the United States and because of their treatment while in the hands of the tax assessor.

In this connection it should be stated that by stipulation of the parties the original answer stood as the answer to the engrossed amended petition.

Matters of fact admitted by pleadings require no findings and as to such facts pleadings in effect become part of findings.

> Kennedy etc. Co. v. S. S. Const. Co., 123 Cal. 584;
> Gregory v. Gregory, 102 Cal., 50;
> Giselman v. Starr, 106 Cal. 651, 659.

III.

UNLIQUIDATED DAMAGES.

Although plaintiff in error is not obliged to rely upon such a contention, there is strong ground for asserting that if it were not in a position to recover on a contract either expressed or implied, it would still be entitled to recover unliquidated damages. The statute gives the right of suit "for damages, liquidated or unliquidated, in cases not sounding in tort." Since the original taking of the animals in this case was with the consent of the plaintiff and was not a tortious act, whatever damages plaintiff is entitled to do not sount in tort.

U. S. v. Cornell Steamboat Co., 202 U. S. 184.

In that case a steamboat company sought to recover from the United States salvage on importation duties which had been paid on certain sugar on the ground that had the sugar been destroyed the United States would have refunded the duties to the importer. The Supreme Court said that petitioner's claim could not be said to arise from either an express or implied contract with the United States, "But the claim may be properly said to be one of unliquidated damages in a case 'not sounding in tort' in respect to which the party would be entitled to redress in a court of admiralty if the United States were suable."

IV.

MEASURE OF DAMAGES.

Plaintiff in error conceives the measure of damages to be:

For the failure to return the mules at the time required by the contract (i. e. for their detention in the hands of the Tax Collector), the value of the use of the mules during the time they were withheld, together with the payment necessary to secure their release; for the injury to the mules, the amount of the difference in value of the property before and after the injury, together with the value of the use of the property during the time that the mules were being put in condition to be used, and the amounts paid out during that time for their feed and care and to cure their injuries.

Rollins v. Bowman Cycle Co., 96 App. Div. (N. Y.) 365;

Baker, &c. Mfg. Co. v. Clayton, 40 Tex. Civ. App. 586, 90 S. W. 519;

Union Stone Co. v. Wilmington Transfer Co., 90 Atl. Rep. 407;

Dunbar &c. Dredging Co. v. Title Guaranty Co., 106 N. Y. S. 180;

Pierce v. Walton, 20 Ind. App. 66. 30 N. E. 309;

Pusey v. Webb, 2 Pennewills Delaware Rep. 490; 47 Atl. 701.

The eighth cause of action, however, was framed to meet the possibility of the contention on the part of defendant in error that the proper measure of damages, so far as expenditures for feed, care, depreciation and loss of use, after the return of the animals to plaintiff in error, were concerned, was merely the decreased value of the mules at the time of their return as compared with their value at the time of their delivery to defendant in error.

In said eighth cause of action damages are so pleaded and placed at the sum of $3960. This sum does not include the charge for the rental value of the mules during the time they were in the hands of the County Assessor, nor the amount paid him to secure the release of them.

CONCLUSION.

An examination of cases decided by the United States Supreme Court under the Tucker Act impresses one with the liberality which that Court has shown in interpreting that act in favor of claimants. Clark v.

United States, *supra,* in which the claimant was allowed to recover under an implied contract although he had not pleaded an implied contract, and U. S. v. Cornell Steamboat Co., *supra,* in which the claimant was allowed to recover salvage on importation duties although there was no law that would require the treasurer of the United States to refund such duties had the property been destroyed, illustrate the attitude of that court toward claimants under the act. The court seems to take the position that in all cases having a contractual basis where there has been a loss that ought in fair dealing and good morals to be borne by all the people of the United States rather than by an individual or a few individuals, judgment should be awarded against the United States for the amount of such claim. We contend that the claim of the plaintiff in error is such a claim. Without any fault whatever on its part it has suffered damage amounting to several thousand dollars. This damage ought not to fall upon it but upon the people of the United States as a whole, in whose behalf the contract under which the loss occurred was made and carried out. Fair dealing between the government and its citizens requires that plaintiff in error should be reimbursed for its loss.

Respectfully submitted,

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